Petition

81-1456

Docket No.

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ALEXANDER L. STEVAS,

In the Supreme Court of the United States

October Term 1982

FREDERIC MARIN,
Petitioner,

v.

ARTHUR R. MYERS and
ADVANCE, INC.,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE
UNITED STATES

FREDERIC MARIN,

Petitioner,

v.

ARTHUR R. MYERS and
ADVANCE, INC.,

Respondent.

QUESTIONS PRESENTED

I. Is a vessel owner required to exercise reasonable care under the circumstances towards a bank auditor boarding the vessel on the vessel owner's business or is the shipowner's duty limited to the duty owed to a longshoreman?

II. If a vessel owner's duty towards a bank auditor boarding the vessel on the owner's busines is limited to the duty owed to a

longshoreman, is that duty limited to the duty to warn only of latent defects?

LIST OF PARTIES

The petitioner is Federic Marin.

The respondents are Arthur R. Myers and Advance Inc.

TABLE OF CONTENTS

Questions Presented. 1

List of Parties. 3

Table of Authorities 5

Statement of Jurisdiction. 6

Statement of the Case. 6

Argument 11

Conclusion 23

TABLE OF AUTHORITIES

TABLE OF CITATIONS

Cases Page

Hamilton v. Marine Carriers Corp., 322 F.Supp. 223 (E.D. Pa. 1971)..... 14

Harris v. H. Schuldt Reederei, 657 F.2d 53 (4th Cir. 1981).....21
Hatfield v. Brown & Root Inc., 245 F.Supp. 733 (E.D. Tex. 1965).14

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).....12
The Ocrecoke, 159 F.552 (D.C. Va. 1908).....14

Riddle v. Exxon Transportation Company, 563 F.2d 1103 (4th Cir. 1977).....16

Scindia Steam Navigation co., Ltd. v. de los Santos, 68 L.Ed. 2d 1 (1981).....18

Tullis v. Fidelity & Casualty Company of New York, 397 F.2d 22 (5th Cir. 1968).....14

Other

Noris, The Law of Maritime Personal Injuries

H.Rep. N. 92-1441.....16

STATEMENT OF JURISDICTION

The date of the decision of the panel of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is October 6, 1981. A petition for rehearing and rehearing en banc was filed. The date of the Court of Appeals' decision denying rehearing is November 5, 1981. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner Frederic Marin brought suit in the United States District Court for the Eastern District of Virginia seeking to recover for personal injuries he suffered in an accident on June 2, 1978. Petitioner was employed at that time as an auditor for the Chemical Bank of New York. He

was on the Eastern Shore of Virginia working on a potential loan which involved the purchase of the fishing vessel Advance and other entities by Arthur R. Myers. During petitioner's work he found it necessary to board the vessel Advance and requested permission to do so from the vessel's owner, Advance Inc. Arthur Myers owned the dock where the Advance was docked.

Petitioner slipped as he boarded the vessel and fell face first onto the vessel's deck. He brought suit on account of his injuries against the owner of the vessel and against the dock owner, alleging negligence by each of them. Jurisdiction in the District Court existed by virtue of diversity of citizenship.

The matter was tried before the District Court, with a jury, on December 2, 1980. However, after

receiving evidence but prior to instructing the jury, the trial court became aware of a conversation which had taken place between Mr. Marin, the plaintiff below, and one of the jurors. The conversation took place while both were in the hallway outside the courtroom. The trial court declared a mistrial. Thereafter, the trial court directed a verdict against the plaintiff in favor of each of the defendants.

Petitioner appealed to the Court of Appeals for the Fourth Circuit. The Court of Appeals per curiam panel decision concluded that the trial court had authority to direct a verdict after orally declaring a mistrial and concluded that the directed verdict was proper because the defendants had a duty to warn Marin only of latent defects. Petitioner sought rehearing

and rehearing en banc on the grounds that the Court of Appeals decision overlooked material law, that a change in the law had occurred after the case was submitted which was overlooked or not considered by the panel, and that there was an apparent conflict with another decision of the Court of Appeals for the Fourt Circuit which the panel opinion did not address. However, rehearing and rehearing en banc was denied by the Court of Appeals. Petitioner now seeks a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the panel's decision.

The facts of this case are in some dispute. What is not disputed is that petitioner was on the Eastern Shore of Virginia in the course of his employment with Chemical Bank of New York. Petitioner was auditing various

financial records in connection with a loan transaction to involve the purchase by respondent Myers of the vessel Advance from respondent Advance Inc. Petitioner asked that he be permitted to go aboard the vessel to check its basic condition, since it would be part of his bank's collateral in the loan under consideration.

It is uncontradicted that there was no gangway, ladder, or other means of boarding the vessel. One had to step from the dock down onto pilings, then down onto a pipe which ran along the vessel's rail, then down onto the vessel's deck. As petitioner stepped from a piling towards the ship's railing, petitioner slipped and landed face first on the vessel's deck. Petitioner was wearing ordinary street

shoes, no special footwear having been offered to him by the ship's personnel nor requested of them by petitioner.

ARGUMENT

The Court of Appeals decision is contrary to the decisions of this Court. A writ of certiorari should therefore issue in order to bring the Court of Appeals decision into conformity with this Court's governing decisions.

The trial court directed a verdict in favor of the respondent shipowner and the respondent dock owner on the grounds that the lack of any gangway or ladder was open and obvious to Mr. Marin and there was no duty on the respondents to warn about something open and obvious. The Court of Appeals recognized that Marin was a business invitee as to both the dock owner and the vessel owner. However, the Court

of Appeals concluded that Marin proceeded at his own risk, knowing the pilings upon which he had to step were slippery, and therefore he could recover from neither defendant.

This Court has previously considered a case involving strikingly similar facts. In Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), a guest of a ship's crewman was injured as he started to leave the vessel. The guest fell while descending on a stairway. The trial court there had instructed the jury that the plaintiff's contributory negligence would operate as a bar to recovery, which this Court found to be error. Contributory negligence was to be considered only in mitigation of damages. Id. at 553. Furthermore, this Court said "It is a settled principle of maritime law that a

shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the ship's crew." Id. at 554. This Court said that common law distinctions such as "licensee" or "invitee" were foreign to maritime law and therefore held that:

> "[t]he owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interest the duty of exercising reasonable care under the circumstances of each case." Id. at 555.

The Court did not permit application of such land-based notions as contributory negligence bars any recovery, assumption of the risk, or no duty to remedy open and obvious defects. Instead, the court required that the

jury be permitted to weigh all the facts and circumstances of the case in order to determine negligence.

The shipowner's duty of exercising reasonable care clearly extends to providing reasonably safe ingress to and egress from the ship. Norris, The Law of Maritime Personal Injuries (3d Ed. 1975), citing The Ocracoke, 159 F.552 (D.C. Va. 1908). See also Tullis v. Fidelity and Casualty Company of New York, 397 F.2d 22 (5th Cir. 1968); Hamilton v. Marine Carriers Corp., 322 F.Supp. 223 (E.D. Pa. 1971); Hatfield v. Brown and Root Inc., 245 F.Supp. 733 (E.D. Tex. 1965). Thus, in the instant matter, Kermarec requires that the jury be permitted to, indeed be instructed to, consider all the circumstances of the case and then determine whether the shipowner exercised reasonable care. Instead,

the trial court took the case from the jury, finding the plaintiff to have been contributorily negligent and finding that the dangerous condition was open and obvious to him. Under Kermarec, of course, neither contributory negligence nor open and obvious is necessarily a defense for the shipowner. By taking the case from the jury then, the trial court violated the rule of Kermarec. By affirming the trial court, the Court of Appeals for the Fourth Circuit has only compounded that error.

The Court of Appeals not only failed to follow Kermarec but rewrote admiralty law. The Court of Appeals applied to Marin the rules applicable to suits by longshoremen against vessel owners. Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, longshoremen were

restricted from suing based on unseaworthiness and were limited to suits for negligence. The House Committee Report accompanying the 1972 Amendments expressed Congress' intent that in third-party suits against shipowners longshoremen and vessel owners are to be treated as land-based parties would be. H.Rep. No. 92-1441 92d Cong., 2d Sess. Thus, many courts of appeals have applied the Restatement of Torts provisions to determine the standard of care applicable to suits by longshoremen against vessel owners. Such was the approach taken by the Court of Appeals for the Fourth Circuit in Riddle v. Exxon Transportation Company, 563 F.2d 1103 (4th Cir. 1977). The Riddle Court held that a shipowner was under a duty to warn the

"longshoremen" only of latent defects. Thus a shipowner would not be liable for an open and obvious defect.

The Marin panel decision applied the Riddle holding to Marin's action and concluded that the shipowner had no duty to do other than warn of latent defects. The Marin court ignored any duty to provide reasonably safe ingress and egress or any duty to exercise reasonable care under the circumstances. Thus, the Marin opinion violated the Kermarec holding.

There is no justification for treating Marin differently than plaintiff Kermarec was treated. Both were in a similar status on board the respective vessels. Marin was a bank auditor on board in that capacity. He was not a longshoreman and did not receive compensation under the Longshoremen's Act. Thus, the Court of

Appeals erred in applying to Marin the standard of care applicable to longshoremen's suits against vessel owners. It is instead the Kermarec standard which governs Marin's suit.

Even if the vessel owner standard of care applicable in longshoremen's suits applies to Marin, the Court of Appeals applied the wrong standard. This Court clarified the vessel owner standard of care in longshoremen's negligence suits in Scindia Steam Navigation Co., Ltd. v. de los Santos, 68 L.Ed. 2d 1 (1981). The Court said the vessel owner owed the stevedore and his longshoremen employees the duty of exercising due care under the circumstances, which extended at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore would

be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property. Id. at 12. Even applying the longshoremen's standard to petitioner Marin then, it is clear that the complete absence of any gangway, ladder, handrail, or other means of boarding the vessel, and the need to step from the dock down onto pilings, then down onto a pipe along side the ship's rail, and then down onto the vessel's deck, could all be considered by the jury to be a breach of the shipowner's duty of exercising reasonable care. Even under the standard of care applicable to longshoremen then, Marin's claim should have been permitted to go to the jury.

The de los Santos opinion also recognizes that a shipowner may not defend on the ground that the

longshoreman should have refused to continue working on the face of an obviously dangerous condition which the stevedore was not remedying. Id. at 18, n. 22. Yet this is precisely one of the grounds upon which the Marin Court of Appeals affirmed the trial court. The Court of Appeals said:

> "The evidence shows that the wet and slippery condition of the piling was open and obvious to anyone exercising reasonable caution for his own safety. Indeed, Marin himself admitted knowing that the piling was wet. Marin clearly proceeded at his own risk, and therefore was not entitled to recover from either defendant."

That language is clearly inconsistent with and contrary to this Court's holding in de los Santos. Thus, even if Marin is held to a longshoreman's standard of care, the Court of Appeals applied an incorrect standard.

The error by the Court of Appeals is curious indeed in light of another recent decision by the Court of Appeals for the Fourth Circuit. In Harris v. H. Schuldt Reederei, 657 F.2d 53 (4th Cir. 1981), the Fourth Circuit reversed and remanded for a new trial the case of a longshoreman injured by an allegedly defective ship's winch. The trial court in Harris had instructed the jury that "The shipowner has no duty to warn of conditions of the vessel which are open, obvious or comprehensible to any reasonable person exercising reasonable care." The Court of Appeals reversed, saying:

> "We find that the instruction given by the District Court in the instant case was clearly inadequate under Scindia. The instruction reflected the view, explicitly rejected in Scindia, that a shipowner owes no duty to

> longshoremen with respect to open and obvious dangers." Id. at 54-55.

If the Marin court had followed the same reasoning as the Harris court, as mandated by de los Santos, the Marin court would also have recognized that it is incorrect to say a shipowner owes no duty with respect to open and obvious dangerous conditions. The Harris opinion was specifically called to the Marin court's attention by petitioner in his petition for rehearing; the Marin court denied rehearing however. Thus, the Marin court's failure to follow this Court's ruling in de los Santos and the Marin court's inconsistency with the Fourth Circuit's own Harris decision remains in full force and effect. Indeed, the Marin decision has been upgraded from an unpublished to a published decision.

Though the Marin panel decision is inconsistent with two decisions of this Court, as a published decision of the Court of Appeals for the Fourth Circuit, Marin may now be cited as precedent. The Marin decision must be brought into conformity with the governing decisions of this Court in Kermarec and de los Santos and with the Fourth Circuit's own Harris decision. The instant petition then uniquely calls out for the supervision of this Honorable Court. The writ of certiorari should be issued to the Court of Appeals for the Fourth Circuit to review the Marin panel decision.

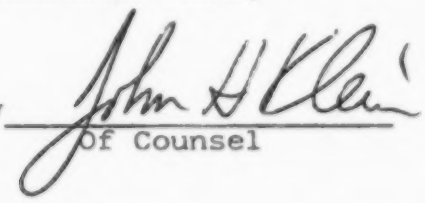
CONCLUSION

For the reasons set forth herein, because the Court of Appeals for the Fourth Circuit has applied the incorrect standard of care in the instant matter, and has ruled contrary

to two governing decisions of this Honorable Court, the instant panel decision calls for the supervision of this Court. Wherefore petitioner prays this Court to grant a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the judgment herein.

Respectfully submitted,

FREDERIC MARIN,

By 
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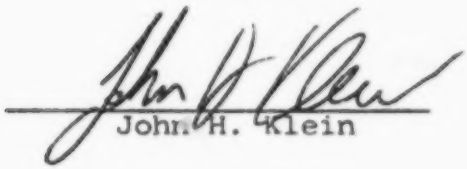
CERTIFICATE OF SERVICE

I John H. Klein certify that on February 3, 1982, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to Allan S. Reynolds and Richard I. Gulick, counsel for respondents.



John H. Klein

Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 80-1870
Frederic Marin,
Appellant,
v.
Arthur R. Myers and
Advance, Inc.
Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.
Argued: August 4, 1981
Decided: October 6, 1981
Before RUSSELL, WIDENER and HALL, Circuit Judges.

PER CURIAM:

Frederic Marin was injured when he fell while attempting to board the clam boat ADVANCE. He sued to recover damages from F.V. Advance, Inc., owner of the boat, and Arthur R. Myers, owner of the Cape Charles Docks in Eastern Virginia, where the boat was moored. The district court directed a verdict against the plaintiff. He appeals, and we affirm.

Myers wanted to purchase the ADVANCE and asked Chemical Bank of New York for a loan. Marin, an auditor for the bank, was sent to appraise the ADVANCE. The only way to board the boat was to step on some pilings next to the dock, step down onto one of the boat's side rails, and then step down again to the deck. Marin was wearing street shoes when he attempted this boarding procedure. He slipped on a wet piling and fell face first onto the deck.

Marin alleged negligence on the part of both F.V. Advance, Inc. and Myers. There was conflicting testimony about whether Marin had been told of the hazards of boarding the ADVANCE or had been cautioned that he should have worn other shoes. However, Marin did admit knowing that the pilings were wet.

The case was tried to a jury. After both sides had rested, the court took a brief recess during which Marin had a conversation with a juror. The judge was informed of this conversation and orally declared a mistrial after questioning both Marin and the juror.[1] However, the judge then decided it would be better to direct a verdict in favor of both defendants on the ground that they did not have the duty to warn Marin of an open and obvious danger.

On appeal, Marin's first argument is that the district judge lost authority to direct a verdict afer he had declared a mistrial. We summarily reject this contention. Even though the judge had verbally indicated that

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[1] No order directing a mistrial was ever entered.

he was declaring a mistrial, he retained the power to reconsider his own actions.

Marin's alternative argument is that a directed verdict was improper because of the conflicting testimony whether the defendants had warned him of the danger of crossing the wet pilings in street shoes. The fundamental flaw in this argument is that the defendants had no duty to warn Marin of this type of danger.

Marin was a business invitee as to both the dock owner and the boat owner. Myers, the dock owner, who is subject to the law of Virginia, owed Marin a duty of reasonable care, but was not obligated to warn him of open and obvious dangers. Atlantic Co. v. Morrisette, 193 Va. 332, 333, 94 S.E. 2d 220, 222 (1956). Similarly, under admiralty law, F.V. Advance, the boat

owner, had a duty to warn Marin only of latent defects. Riddle v. Exxon Transp. Co., 563 F.2d 1103 (4th Cir. 1977).

The evidence shows that the wet and slippery condition of the piling was open and obvious to anyone exercising reasonable caution for his own safety. Indeed, Marin himself admitted knowing that the piling was wet. Marin clearly proceeded at his own risk, and therefore was not entitled to recover from either defendant.

In sum, the district court's decision correctly reflects the reality that a new trial in this case would be a fruitless exercise, progressing only to the point where the defendants again would be entitled to a directed verdict. Accordingly, the decision of the district court is affirmed.
AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 80-1870

Frederic Marin,
Appellant,
versus
Arthur R. Myers and Advance, Inc.,
Appellees.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Russell, Judge Widener, and Judge Hall.

For the Court,

/s/ William K. Slate, II, Clerk

FILED November 5, 1981

Opposition

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DOCKET NO. 81-1456

In the Supreme Court of the United States

October Term, 1982

FREDERIC MARIN,
Petitioner,

v.

ARTHUR R. MYERS and
F.V. ADVANCE INC.,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Table of Authorities 2

Statement of the Case 3

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

TABLE OF CITATIONS

Cases	Page
Hamilton v. Marine Carriers Corp., 332 F.Supp. 223 (E.D. Pa. 1971)	7
Hatfield v. Brown & Root Inc., 245 F.Supp. 733 (E.D. Tex. 1965).	7
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959)	4
The Ocracoke, 159 F.552 (D.C. Va. 1908)	8
Scindia Steam Navigation co., Ltd. v. de los Santos, 68 L.Ed. 2d 1 (1981) 101 S.Ct. 1614	5
Tullis v. Fidelity & Casualty Company of New York, 397 F.2d 22 (5th Cir. 1968)	7

STATEMENT OF THE CASE

Respondent, F.V. Advance, Inc., adopts Petitioner's Statement of the Case with one clarification and one addition.

The last complete paragraph on page 10 of the Petition indicates the Petitioner slipped while stepping from a piling to the ship's railing whereas, in fact, the evidence below, as adopted by the Court of Appeals, indicates clearly that the Petitioner slipped on a wet piling which he knew to be wet before he stepped on it.

An important additional fact which should be clear from the record in the District Court is that the Petitioner presented no evidence as to regulations, accepted standards of care or custom which would require a gangway or ladder as a means of access to a clam boat

alongside the pier in question. On the contrary, in his own case in chief, Petitioner presented evidence that it was not customary at the pier in question to provide either gangways or ladders for access to a vessel such as Petitioner's clam boat at that pier.

ARGUMENT

The Court of Appeals decision is not contrary to the decisions of this Court; therefore there is no reason for a Writ of Certiorari to be issued to the Court of Appeals.

Petitioner contends that the Court of Appeals violated the standard of Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) in holding that Respondent had only a duty in the instant case to warn of the latent defect. We submit that there is a great difference between Kermarec and Marin in

that Kermarec was already aboard the vessel and was injured because of a defect in the vessel which was there because of the negligence of the vessel's owners. In Marin, the Petitioner arrived head first on the vessel because he slipped in his street shoes on a wet piling which was open and obvious to him. The cause of his fall was not directly related to the vessel in any way. Therefore, we submit that the rule of Kermarec has not been violated by the District Court or the Court of Appeals in this case.

Petitioner further contends that the Court of Appeals applied a standard of care to the Petitioner which was inconsistent with this Court's holding in Scindia Steam Navigation Co., Ltd. v. de los Santos, 68 L.Ed. 2d 1, 101 S.Ct. 1614 (1981). We submit that in

Scindia this Court was construing Section 5(d) of the Longshoremen's and Harbor Worker's Compensation Act as Amended in 1972, 33 USC Section §§901-950 which manifestly does not apply to the factual situation in Marin where an auditor sought to go aboard a vessel while working on a potential loan in connection with the vessel's purchase.

It would indeed be a paradox for the dock owner to escape liability for a wet piling on his dock and the boat owner to be held liable for that condition when the condition was open and obvious to Marin. We submit that the only plausible basis for holding the Respondent liable in Marin would be on the basis that the evidence in the District Court indicated a statute, rule of case law or established custom at the pier involved for the type vessel

involved requiring that the vessel owner should have provided a ladder or gangway from the pier to the vessel. We submit that no statute has been cited for that proposition, that the cases cited by the Petitioner which make mention of the means of ingress or egress to a vessel either deal with seamen or are not in point for another reason and that no custom at the pier involved for the type vessel here involved required use of of a gangway or ladder.

Hamilton v. Marine Carriers Corp., 332 F. Supp. 223 (E.D. Pa. 1971) and Hatfield v. Brown & Root Inc., 245 F. Supp. 733 (E.D. Tex. 1965) involved injuries to crew members to whom a higher standard of care was due and to whom the warranty of seaworthiness extended. In Tullis v. Fidelity & Casualty Company of New York, 397 F.2nd 22 (5th Cir. 1968)

the Court considered the sufficiency of the complaint in establishing admiralty jurisdiction; i.e., whether a plank extending from a group of pilings a short distance from a pier to the pier was an extension of land so that a fall from it would not be within the admiralty jurisdiction of the Federal District Court. In The Ocracoke, 159 F.552 (D.C. Va. 1908) the Court held, under circumstances of that case, the ship was negligent in not informing the Plaintiff of the intended landing place and failed to employ the proper employees to render services to passengers on landing. The ship did not intend to have a gangway at the location where the Plaintiff fell and the Plaintiff knew there was no gangway there; so the presence or absence of the gangway was not the controlling factor in The Ocracoke. It was a combination

of other factors which led the Court to believe the defendant was negligent.

CONCLUSION

The Respondent respectfully submits that the Court of Appeals for the Fourth Circuit has not ruled contrary to any decisions of this Honorable Court. Wherefore Respondent prays that this Court deny the Petition herein for Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

F/V ADVANCE INC.

By _____
Of Counsel

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CERTIFICATE OF SERVICE

I, Richard I. Gulick, certify that on March 5th, 1982, 40 copies of this Brief in response to Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to John H. Klein, counsel for Petitioner, and to Allan S. Reynolds, counsel for co-respondent.

Richard I. Gulick